

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

ENDORSED FILED
IN THE OFFICE OF

In re:

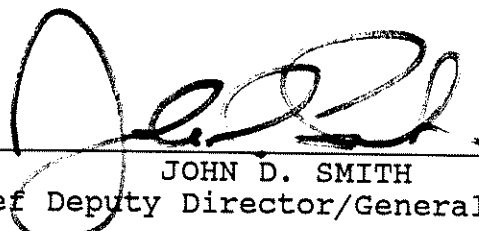
Request for Regulatory)
Determination filed by)
the Pacific Gas and)
Electric Company concern-)
ing State Water Resources)
Control Board Directives)
(1) "Public Trust Consid-)
erations," and (2) "Con-)
sideration of the Consti-)
tutional Requirement of)
Reasonableness of Use and)
Diversion of Water"--Both)
Concerning Instream Uses)
Of Water For Fishery)
Enhancement¹)

1988 OAL Determination No. 14
[Docket No. 87-020]
SEP 2 4 24 PM 1988
HAROLD JUNG EU
OFFICE OF THE ATTORNEY GENERAL
STATE OF CALIFORNIA

September 2, 1988

Determination Pursuant to
Government Code Section
11347.5; Title 1, California
Code of Regulations,
Chapter 1, Article 2

Determination by:



JOHN D. SMITH

Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney

Victoria S. Cline, Staff Counsel

Rulemaking and Regulatory

Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether the State Water Resources Control Board's "Directives" concerning instream uses of water for fishery enhancement, prescribing criteria for filing complaints of waste and unreasonable use of water, are "regulations" required to be adopted in compliance with the Administrative Procedure Act. Following filing of the Request for Determination, but prior to issuance of this Determination, these "Directives" were rescinded by the agency.

The Office of Administrative Law has concluded that, from the time of adoption of the "Directives" until on or about April 6, 1988, the State Water Resources Control Board failed to comply with the Administrative Procedure Act in that the "Directives" implemented, interpreted, or made specific statutory or constitutional law, or supplemented regulatory law that governs waste and unreasonable use of water.

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THE ISSUE PRESENTED 2

The Office of Administrative Law ("OAL") has been requested to determine³ whether the "Directives" of the State Water Resources Control Board ("Board")--(1) "Public Trust Considerations" and (2) "Consideration of the Constitutional Requirement of Reasonableness of Use and Diversion of Water"--both concerning instream uses of water for fishery enhancement and prescribing criteria for filing complaints, are "regulations" as defined in Government Code section 11342, subdivision (b), and therefore violate Government Code section 11347.5, subdivision (a).⁴

THE DECISION 5,6,7,8

The Office of Administrative Law finds that:

- I. From the time of their adoption until on or about April 6, 1988,⁹ the two above noted "Directives":
 - (1) were subject to the requirements of the Administrative Procedure Act ("APA"),¹⁰
 - (2) were "regulations" as defined in the APA, and therefore
 - (3) violated Government Code section 11347.5, subdivision (a).
- II. On April 6, 1988, the Board rescinded the two "Directives," thereby in effect removing them from the regulatory realm.¹¹ Thus, the "Directives" are no longer subject to the requirements of the APA.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The position of State Engineer was created in 1878 to investigate problems of irrigation, drainage and navigation of rivers.^{12,13} Water control grew and changed in succeeding years to keep pace with the burgeoning needs and technology of a more complex society. The present State Water Resources Control Board was created by the Legislature in 1967 by combining the State Water Rights Board and the State Water Quality Control Board into one body.^{14,15}

Although the Board is divided into two statutory divisions, water rights and water quality, there are also additional administratively created divisions. The Board's powers include, among other things, investigation, supervision of water distribution, appropriation of water, issuance of permits and licensing rights, determination of rights, water quality control, and adoption of policy and regulation.

Authority ¹⁶

Water Code section 1058 provides:

"The board may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under this code."

Water Code section 185 provides:

"The board shall adopt rules for the conduct of its affairs in conformity, as nearly as practicable, with the provisions of [the APA]." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."¹⁷ Since the Board is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.¹⁸

In any event, Water Code section 185, cited above, specifies that the Board's rulemaking is subject to the requirements of the APA.

General Background

To facilitate understanding of the issues presented in this proceeding, we discuss pertinent constitutional, statutory and regulatory history as well as the undisputed facts and circumstances giving rise to the present Determination.

The fundamental policy of reasonable use and conservation of water is set out in the California Constitution. Article X, section 2 of the Constitution provides, in part:¹⁹

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water"

[Emphasis added.]

The Constitution further provides, as noted in the Response to the Request for Determination ("Response"),²⁰ that section 2 "shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained." Notwithstanding the "self-executing" provision, the Legislature found it necessary to implement this basic policy in order to make it effective.²¹

Water Code provisions have been broadly interpreted in the courts. In National Audubon Society v. Superior Court of Alpine County²²--cited both in the Directive, "Public Trust Considerations," and in the Response--the Supreme Court held that the State has an affirmative duty as administrator of the public trust. This duty includes consideration of such trust before approval of water right appropriation applications. Further, the Audubon court extended the public trust doctrine so that, once appropriation has been approved, the trust imposes a duty of continuing supervision over taking and use of appropriated water.²³ All uses of water, therefore, including public trust uses, must conform to a standard of reasonable use.²⁴

In a 1986 case, Imperial Irrigation District v. State Water Resources Control Board,²⁵ the California Court of Appeal stated:

"The Legislature . . . has established a thorough statutory system insuring reasonable water allocation and safeguarding water purity, commensurate in scope with constitutional provision. [Citation.] The statutes vest the [Board] with full authority to 'exercise

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the adjudicatory and regulatory functions of the state in the field of water resources.' . . . The [Board's] powers extend to regulation of water quality and prevention of waste. [Citation.] It has adopted administrative regulations to prevent waste and unreasonable use . . . "26 [Emphasis added.]

The Board, since its inception, has promulgated regulations implementing, interpreting and making specific Water Code statutes, as necessary. These regulations are contained in Title 23 of the California Code of Regulations ("CCR").²⁷ One such regulation is section 856, "Investigations."

"The board staff shall investigate an allegation of misuse of water:

"(1) when an interested person shows good cause, or

"(2) when the board itself believes that a misuse may exist."

Early in 1987, the Division of Water Rights, a statutory division of the Board, published and issued to different parties, including the Requester, the challenged Directives, prescribing the manner in which complaints alleging violations of the public trust doctrine or waste or unreasonable use under existing water rights must be submitted to the Board. On August 20, 1987, Richard Moss of the Pacific Gas and Electric Company (PG&E, "Requester") wrote to W. Don Maughan, Board Chairman, calling upon the Board to rescind the distribution and/or use of these Directives until such time as they were legally promulgated as valid regulations. Not receiving a response to this letter, Requester filed a Request for Determination, which was received by OAL on October 15, 1987.

In the Board's Response to the Request, dated April 6, 1988, received by OAL on June 20, 1988, James L. Easton, Executive Director of the Board, stated that the subject "directives are no longer in effect at this time."²⁸ (Emphasis added.) Cited in and attached to the Response was a letter to the Requester, in which the discontinuance of the Directives' use by the Division of Water Rights was advised "because the directives might contravene applicable provisions of the APA."²⁹

II. DISPOSITIVE ISSUES

There are two main issues before us:³⁰

- (1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

" . . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first part of this inquiry is "yes."

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For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.³¹

The challenged rules at issue here are clearly rules of general application. The Board admits in its Response that "[t]he directives in question prescribe the manner in which complaints that allege violations of the public trust doctrine or waste or unreasonable use under existing water rights must be submitted to the State Board." These complaints may be submitted by individuals harmed as a direct result of water diversion or use, or may be members of the public alleging that fish or wildlife species are threatened or that fishing opportunities have been severely reduced. Any member of the California public may thus be eligible to complain of a public trust water violation, and could thereby be affected by the criteria prescribed for filing a petition or complaint.

The Directive, "Public Trust Considerations," states, in part:

"If any party, wishes to have the Board consider amendments to a licensed or permitted water right under the Board's jurisdiction, a separate petition should be filed. Staff believes that such a petition should make at least a prima facie showing that uses protected by the public trust have been impacted unreasonably in order to be accepted and considered by the Board. To that end, the following information should be included:

- "(1) Documentation that a use of water protected by the public trust is impacted by the diversions made under the licensed or permitted rights. In the case of the use of water for fishery maintenance, the petitioner should identify the types of fishlife that exist in the stream and document that they have been adversely impacted since the implementation of the diversions under the permit or license issued by the Board.
- "(2) Evidence that the existing diversions under these rights are unreasonable in light of the adverse impacts to a use of water protected by the public trust. In the case of the use of water for fishery maintenance, the petitioner should state how the adverse impacts identified under (1) above are unreasonable. . . .
- "(3) A proposed solution to the situation in the form of either:

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- (A) specific requirements that would alleviate the adverse impact;
- (B) a study process that would result in the development of specific requirements to alleviate the adverse impact. . . ."

Similarly, the Directive, "Consideration of the Constitutional Requirement of Reasonableness of Use and Diversion of Water," states, in part:

". . . individuals who wish to have the Board consider allegations of unreasonable uses or diversions must file an application (or petition) with the Board. Staff believes that such petition should make at least a prima facie showing that unreasonable uses or diversions of water are occurring in order to be accepted and considered by the Board. To that end, the following information should be included:

"(1) Evidence that the existing diversions or uses of water are unreasonable in light of the adverse impacts to uses of water for fishery maintenance and enhancement. . . .

"(2) A proposed solution to the situation"

The above examples illustrate the criteria set forth in the Directives, criteria with which members of the public must comply in order to have their petitions or complaints accepted and considered. The Board did not dispute the Requester's allegation that the Directives ". . . are, at a minimum, 'standards of general application . . . adopted . . . to implement, interpret, or make specific the law enforced or administered by it or to govern its procedure. . . .'"

Additionally, the Directives modify or supplement an existing regulation. Title 23, CCR, chapter 3, subchapter 2 contains the Board's regulations concerning "Appropriation of Water." One such regulation in article 22, "Prevention of Waste and Unreasonable Use," is section 856,³² "Investigations," which provides:

"The board staff shall investigate an allegation of misuse of water:

"(1) when an interested person shows good cause, or

"(2) when the board itself believes that a misuse may exist."

Thus, both Directives clearly supplement section 856.

Of note is the fact that section 745, article 9 of Title 23, CCR, sets forth requirements for protesting proposed appropriations which bear marked similarities to the Directives' requirements, although not as extensive nor covering instances of continuing use.

We therefore conclude that both Directives are standards of general application.

In order to answer whether the Directives also meet the second prong of the "regulation" test, we must determine whether or not the Directives implement, interpret or make specific the law which the Board, through the agency of the Division of Water Rights, administers or enforces.

We conclude that the Board's Directives, prescribing criteria for filing complaints based on the public trust doctrine and the doctrine of waste and unreasonable use, implement, interpret or make specific Water Code sections 275 and 1051.³³

Section 275 provides:

"The department and board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state." [Emphasis added.]

Section 1051 provides:

"The board for the purpose of this division may:

"(a) Investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water.

"(b) Take testimony in regard to the rights to water or the use of water thereon or therein.

"(c) Ascertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this State."

As can be seen by the above, the Legislature has not been specific as to the methods the Board may take to prevent waste or unreasonable use of water other than to authorize investigation, taking of testimony and ascertaining legality in instances of water previously appropriated.³⁴ However, the court in Audubon has interpreted the constitutional public trust doctrine and section 2501 of the Water Code, providing for determination of rights proceedings,³⁵ to mean that the Board has broad substantive powers to carry out the legislative mandate of comprehensive protection of water resources. These powers extend to grant persons claiming that use of water is harmful to interests protected by public

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trust the right to seek a determination of the Board which may include reconsideration of rights previously granted.³⁶

The law currently does not prescribe specific means or methods of submitting these public trust violation complaints to the Board; however, the Board has the continuing duty to receive and investigate these complaints. Therefore, the Directives met the second prong of the "regulation" test during the period from the date of their issuance through the date of their rescission, April 6, 1988.

WE CONCLUDE that the Directives are standards of general application and that they implement, interpret or make specific applicable provisions of the Water Code, case law as set forth in Audubon, and section 2, article X of the California Constitution; and supplement section 856 of Title 23 of the California Code of Regulations.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to procedural requirements of the APA.³⁷

The Board has not claimed any exemption or exception to the APA in its Response, and none are applicable here.

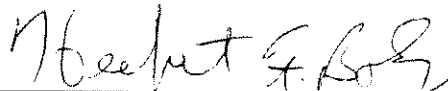
WE CONCLUDE, therefore, that none of the available APA exceptions applies to the challenged Directives.

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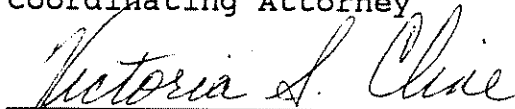
III. CONCLUSION

For the reasons set forth above, OAL finds that the Board's two Directives, regarding instream uses of water for fishery enhancement and prescribing criteria for filing complaints (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and therefore (3) violated Government Code section 11347.5, subdivision (a), between the date of issuance and April 6, 1988, the date of the Board's notification to OAL of rescission of the Directives.

DATE: September 2, 1988



HERBERT F. BOLZ
Coordinating Attorney



VICTORIA S. CLINE
Staff Counsel

Rulemaking and Regulatory
Determinations Unit³⁸
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, ATSS 8-473-6225
Telecopier No. (916) 323-6826

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- 1 This Request for Determination was filed by Richard H. Moss, Attorney for Pacific Gas and Electric Company, 77 Beale Street, P. O. Box 7442, San Francisco, CA 94120, (415) 972-6341. The State Water Resources Control Board was represented by James L. Easton, Executive Director, and John W. Richards, Staff Counsel, 901 P Street, P. O. Box 100, Sacramento, CA 95801-0100, (916) 323-5344.
- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were

"merely an internal enforcement and selection mechanism.")

Readers aware of additional "underground regulations" decisions--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 37, infra).

- 3 Title 1, California Code of Regulations (CCR) (formerly known as California Administrative Code (CAC)), section 121(a), provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."
[Emphasis added.]

- 4 Government Code section 11347.5 (as amended by Stats. 1987, c. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

- 5 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." [Emphasis added.]

6 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

In the matter at hand, a Response to the Request was submitted by the Board. This Response was considered in making this Determination. Although the Board has conceded that its Directives may in fact be "underground regulations" and has discontinued their use, OAL is issuing this Determination as required by Title 1, CCR, section 123. The Board's cooperation in this matter is appreciated and the finding that the APA was violated applies solely to that period of time between issuance of the Directives and date of rescission.

- 7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subdivision (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal. Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute).
- 8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on page 1.
- 9 The record before us does not pinpoint the precise date of rescission. The letter to Richard Moss of PG&E (Requester) from Chief Counsel William Attwater of the Board, dated November 2, 1987, stated that Mr. Attwater had ". . . advised the Division of Water Rights to discontinue [the] use [of the Directives]" as they "may contravene applicable [APA] sections." (Emphasis added.) A copy of this letter was attached to the Board's Response to Request for Determination.

The Response, stating that "these directives are no longer in effect at this time," dated April 6, 1988, was received by OAL on June 20, 1988. (Emphasis added.) Based upon the above facts, we conclude that the rescission date was April 6, 1988. The rescission letter was not made part of the record, however, until June 20, 1988, substantially after the Request was noticed for public comment in the California Regulatory Notice Register on June 3, 1988 (Reg. 88, No. 23-Z).

- 10 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 11 If the use of the Directives should continue or if the Board should reinstate them without benefit of formal adoption pursuant to the APA, then the finding reflected in Roman numeral I of "The Decision" of this Determination would apply.
- 12 For a detailed history, see "California Water Law In Perspective," Gavin M. Craig, West's Ann. Water Code (1971 ed.), pp. LXV-CVIII.
- 13 Statutes 1877-78, chapter 429.
- 14 Statutes 1967, chapter 284; Water Code, article 3, chapter 2, division 1.
- 15 "California Water Law In Perspective," supra, note 12 at pp. XCII-XCV.
- 16 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not

review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 17 Government Code section 11342, subdivision (a). See Government Code sections 11343 and 11346. See also 27 Ops.Cal. Atty.Gen. 56, 59 (1956).
- 18 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 19 Set out in full in Attachment B of the Request, p. B-1: the Directive, "Consideration of the Constitutional Requirement of Reasonableness of Use and Diversion of Water."
- 20 Board's Response, p. 2 and attached letter of November 7, 1987, by William R. Attwater, Chief Counsel of the Board.
- 21 Modesto Properties Co. v. State Water Rights Board found that:

"Although article 14, section 3 [now art. 10, sec. 2] states that it is self executing, it is evident that if the policy therein stated was to be made truly effective, it required legislative implementation. Accordingly, the Legislature has passed a series of acts which presently comprise the Water Code. This code creates the Water Rights Board, and hence we must look to it in order to determine the scope of the jurisdiction granted

to the board." [Emphasis in original; (1960) 179 Cal.App.2d 856, 861, 4 Cal.Rptr. 226, 229.]

(Note: The 1976 addition of article 10, section 2, was identical in text to article 14, section 3, prior to its repeal June 8, 1976.)

- 22 (1983) 33 Cal.3d 419, 189 Cal.Rptr. 346; cited hereinafter as Audubon. (Department of Water and Power of the City of Los Angeles, real party in interest.)
- 23 Id. at pp. 356, 360, 364, 365.
- 24 Id., at p. 362.
- 25 186 Cal.App.3d 1162, 1165, 231 Cal.Rptr. 283, 286.
- 26 Ibid., citing with approval Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist. (1977) 20 Cal.3d 327, 342, 142 Cal.Rptr. 904.
- 27 Formerly known as the California Administrative Code ("CAC").
- 28 Board's Response, p. 1.
- 29 See letter dated November 2, 1987, from William R. Attwater, Chief Counsel of the Board, p. 1.
- 30 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- 31 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
- 32 Former Title 23, CCR, section 764.10 was amended and renumbered to section 856, filed 1-16-87, effective thirtieth day thereafter (California Administrative Notice Register 87, No.

10-Z). Previous section 764.10 is cited in the Directive, "Consideration of the Constitutional Requirement of Reasonableness of Use and Diversion of Water." See Request at p. B-1.

- 33 For purposes of discussion, we will focus on Water Code sections 275 and 1051. We conclude, however, that the Directives also implement, interpret or make specific other sections of the Water Code, and section 2, article X of the Constitution, as interpreted by Audubon, cited previously in note 22, supra.

None of the above-mentioned provisions of law are specific regarding complaints or petitions, nor do they even mention public filing of allegations of misuse with the Board. The court in Audubon held, however, that the Board has authority, under the public trust doctrine, to investigate, supervise and reevaluate on a continuing basis those uses of water under previously approved licenses and permits, as well as applications for new permits and licenses.

- 34 The Legislature has been considerably more specific in statutes concerning new applications for appropriations of water. In Fullerton v. State Water Resources Control Board (1979) 90 Cal.App.3d 590, 153 Cal.Rptr. 518, the court held that the Board is vested by Water Code sections 1243, 1243.5, 1253, 1255 and 1257 with maximum flexibility to consider competing demands of flows for piscatorial purposes and diversions for agricultural, domestic, municipal or other uses in considering such applications. Water Code sections 1302-1304 (setting forth time for filing and required contents for protesting applications) and 1428 (objections to issuance of temporary permit), inter alia, provide for the filing of objections with the Board.

- 35 Section 2501 provides:

"The board may determine, in the proceedings provided for in this chapter, all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right."

- 36 Audubon, note 22, supra, at pages 366, 367.

- 37 The following provisions of law may also permit rulemaking agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of Regulatory Determinations is a helpful guide for locating such information. The Determination Index, as well as an order form for purchasing copies of individual determinations, is available from OAL, 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225,

ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$50.

- 38 We wish to acknowledge the substantial contribution of Unit Legal Assistant Annemarie Starr in the preparation of this Determination.